Supreme Court, U.S.
FILED

(1)

No. 991942

APR 10 2000

OFFICE OF THE CLERK

In The

Supreme Court of the United States

DR. SANDRA K. DUNHAM, D.V.M.,
Petitioner,

versus

DR. GEORGE WADLEY, D.V.M.; WINGFIELD MARTIN; DR. EVERETT I. ROGERS; D.V.M.; DR. G. C. BLAIR, D.V.M.; DR. JAMES W. WAYMACK, D.V.M.; DR. DONALD I. MAYFIELD, D.V.M.; DR. GARY F. STRICKLAND, D.V.M.; and SHERRY GLOVER
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert J. Price
PRICE LAW FIRM
5115 Cantrell Road
Little Rock, AR 72207
(501) 664-0878
Attorney for Petitioner

27 pp

QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A STATE LAW WHICH GRANTS AN EXEMPTION FROM THE REQUIREMENT OF A CERTIFICATE OF LICENSE FROM A STATE REGULATORY AGENCY OTHERWISE MANDATORY, FOR ALL PERSONS WHO ENGAGE IN THE REGULATED ACTIVITY, CREATES A PROTECTED PROPERTY INTEREST IN THAT EXEMPTION.

II. WHETHER OFFICIALS WHO CLAIM THE AFFIRMATIVE DEFENSE OF QUASI-JUDICIAL IMMUNITY BEAR THE BURDEN OF PROVING FACTS TO SHOW THAT THEY WERE PERFORMING ACTS FUNCTIONALLY COMPARABLE TO A JUDGE'S AT THE TIMES IN QUESTION, OR WHETHER THE PARTY AGAINST WHOM SUCH A DEFENSE IS ASSERTED BEARS THE BURDEN OF PROVING THAT THE OFFICIALS WERE NOT SO ACTING.

III. WHETHER OFFICIALS OF A STATE REGULATORY BOARD WHO CLAIM QUASI-JUDICIAL IMMUNITY WERE ACTING IN THE COMPLETE ABSENCE OF THEIR JURISDICTION AT THE TIMES IN QUESTION.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities iii

Opinions Below 1

Statement of the Basis of Jurisdiction of the Supreme Court 1

Relevant Constitutional Provisions, Treaties, Statutes, Ordinances, and Regulations Involved 2

Statement of the Case 8

Reasons for Granting the Writ 11

I. IMPORTANT QUESTION WHICH SHOULD BE SETTLED.....11

II. ABSOLUTE IMMUNITY.....15

Conclusion 21

TABLE OF AUTHORITIES

Cases

Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993)..... 18

Craft v. Wipf, 836 F.2d 412, 417 (8th Cir. 1987)..... 13

Dunham v. Wadley, et al, 105 F.3d 1007 (1999)..... 1

Forrester v. White, 484 U.S. 219, 225, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988)..... 17

Jennings v. Lombardi, 70 F.3d 994 (8th Cir. 1995)..... 13

Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993)..... 18

Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991)..... 19

Robinson v. Freeze, 15 F.3d 107 (8th Cir. 1994)..... 18

Statutes

U.S. Const., Art. XIV, Sec. 1..... 2
Ark. Const., Art. 7, Sec. 11..... 2,20
Ark. Const., Art 7, Sec. 40..... 2,20
28 U.S.C. § 1254(1)..... 1
28 U.S.C. § 1331..... 8
28 U.S.C. § 2106..... 1
42 U.S.C. § 1983..... 3,8
Ark. Code Ann. §16-88-101..... 7,20
Ark. Code Ann. §17-10-101 through
§17-106-111.....11,12,13
Ark. Code Ann. §17-99-101..... 16
Ark. Code Ann. §17-99-305..... 20
Ark. Code Ann. §17-99-307..... 4
Ark. Code Ann. §17-99-312..... 6,20,21

OPINIONS BELOW

The opinion of the United States District Court is not reported, and is included in the Appendix at App. 1. The opinion of the United States Court of Appeals for the Eighth Circuit is reported at195 F.3rd 1007 (1999), and is included in the Appendix at App. 14.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The United States Court of Appeals for the Eighth Circuit issued its opinion on November 10, 1999. (App.14) On December 8, 1999, Petitioner filed a Suggestion for Rehearing En Banc, deemed by Eighth Circuit Rule 40A(b) to include a petition for rehearing by the panel, which the United States Court of Appeals denied on January 11, 2000. (App. 24) The Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1), and § 2106.

RELEVANT CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

United States Constitution, Article XIV, Section 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ark. Const., Art. 7, §11

§ 11. Circuit courts - Jurisdiction.

The circuit court shall have jurisdiction in all civil and criminal cases the exclusive jurisdiction of which may not be vested in some other court provided for by this Constitution.

Ark. Const., Art. 7, §40

§ 40. Exclusive and concurrent jurisdiction of justices of the peace - Criminal jurisdiction - Process - Power to issue.

They shall have original jurisdiction in the following matters: First, exclusive of the circuit court, in all matters of contract where the amount in controversy does not exceed the sum of one hundred dollars, excluding interest, and concurrent jurisdiction in matters of contract where the amount in controversy does not exceed the sum of three

hundred dollars, exclusive of interest; second, concurrent jurisdiction in suits for the recovery of personal property where the value of the property does not exceed the sum of three hundred dollars, and in all matters of damage to personal property where the amount in controversy does not exceed the sum of one hundred dollars; third, such jurisdiction of misdemeanors as is now, or may be, prescribed by law; fourth, to sit as examining courts and commit, discharge or recognize offenders to the court having jurisdiction, for further trial, and to bind persons to keep the peace or for good behavior; fifth, for the foregoing purposes they shall have power to issue all necessary process; sixth, they shall be conservators of the peace within their respective counties, provided a justice of the peace shall not have jurisdiction where a lien on land or title or possession thereto is involved.

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress

applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Ark. Code Ann.§ 17-99-307

17-99-307. License required - Exemptions.

(a) No person may practice veterinary medicine in this state who is not a licensed veterinarian or the holder of a valid temporary permit issued by the board.

(b) This chapter shall not be construed to prohibit:

(1) Employees of the federal, state, or local government from performing their official duties;

(2) Regular students in a veterinary school or college from performing duties or actions assigned by the school or college or working under direct supervision of a licensed veterinarian;

(3) Reciprocal aid of neighbors in performing routine accepted livestock management practices without compensation;

(4) Any veterinarian licensed in any foreign jurisdiction from consulting with a licensed veterinarian;

(5) The owner of an animal, his consignees, and their employees from performing routine accepted livestock management practices in the care of animals belonging to the owner;

(6) A member of the faculty of a veterinary school from performing his regular functions, or a person from lecturing or giving instruction or demonstration

at a veterinary school or in connection with a continuing education course or seminar for licensed veterinarians or registered technicians;

(7) A person from engaging in bona fide scientific research which reasonably requires experimentation involving animals;

(8) A graduate of a foreign college of veterinary medicine who is in the process of obtaining an Educational Commission for Foreign Veterinary Graduates certificate from performing duties or actions under the direction and supervision of a licensed veterinarian;

(9)(A) Any act, task, or function performed by a veterinary technician at the direction of and under the supervision of a licensed veterinarian, when:

(i) The technician is certified by and annually registered with the board as one qualified by training or experience to function as an assistant to a veterinarian;

(ii) The act, task, or function is performed at the direction of, and under the supervision of, a licensed veterinarian in accordance with rules and regulations promulgated by the board; and

(iii) The services of the veterinary technician are limited to assisting the veterinarian in the particular fields for which the assistant has been trained, certified, and registered.

(B) Subdivision (9)(A) of this section shall not limit or prevent any veterinarian from delegating to a qualified person any acts, tasks, or functions which

are otherwise permitted by law, but which do not include diagnosis, prescribing medication, or surgery.

Ark. Code Ann.§ 17-99-312

17-99-312. Unlawful practice - Penalties - Injunctions.

(a) Any person who shall practice or attempt to practice veterinary medicine in this state without having been duly licensed in accordance with the provisions of this chapter shall be deemed guilty of a misdemeanor. Upon conviction, the person shall be fined in any sum of not less than fifty dollars ($50.00) nor more than two hundred fifty dollars ($250) for each and every offense or imprisoned for a term of not less than six (6) months nor more than one (1) year, or shall be both fined and imprisoned in the discretion of the court.

(b) Each day of such unlawful practice shall constitute a separate offense.

(c) One-half (½) of the sums assessed as fines under this chapter shall be paid into the general fund of the county wherein it is assessed, and one-half (½) of the sums assessed as fines under this chapter shall be deposited with the secretary-treasurer of the board and credited to the account of the Veterinary Medical Examining Board.

(d) The unlawful practice of veterinary medicine is declared to be a public nuisance.

(e) In addition to the penalties provided in this section, the board may institute legal proceedings to enjoin the violation of the provisions of this chapter or the rules of the board in any court of competent jurisdiction, and the court may grant a temporary or permanent injunction restraining the violation thereof.

Ark. Code Ann. §16-88-101

§ 16-88-101. Jurisdiction of courts for certain offenses generally.

(a) The jurisdiction of the various courts of this state, for the trial of offenses, shall be as follows:

(1) The Senate of Arkansas shall have exclusive jurisdiction of impeachment;

(2) The Supreme Court shall have general supervision and control over all inferior courts in criminal cases;

(3) The circuit courts shall have general jurisdiction for the trial of all offenses which may be prosecuted by indictment, and all prosecutions and penal actions, except as follows:

(A) City and police courts shall have exclusive jurisdiction of all prosecutions and actions for infractions of the bylaws or ordinances of the city or town in which they are located, concurrent jurisdiction with the circuit courts and justices' courts of prosecutions for misdemeanors committed in the town or city, and also concurrent jurisdiction in the

cases provided by the special statutes creating or regulating such courts.

(B) In criminal causes, the jurisdiction of courts of justices of the peace shall extend to all matters less than felony for final determination and judgment. However, circuit courts shall have jurisdiction concurrent with justices' courts in all criminal cases and in all criminal and penal causes except where exclusive jurisdiction is given to city and police courts.

(b) Where an indictment is found in the circuit court for an offense within its jurisdiction, the court shall have jurisdiction of all the degrees of the offense, and of all the offenses included in the one (1) charge, although some of those degrees or included offenses are within the exclusive jurisdiction of an inferior or local court.

STATEMENT OF THE CASE

The Petitioner seeks review of a judgment of the United States Court of Appeals for the Eighth Circuit; the basis for federal jurisdiction in the United States District Court for the Eastern District of Arkansas, Western Division, the court of first instance, is pursuant to 28 U.S.C. §1331 because the claims arose under the Constitution and laws (42 U.S.C. §1983) of the United States.

Jurisdiction in this Court is sought pursuant to Rule 10(c), because the United States Court of Appeals for the Eighth Circuit Court has decided an important question of federal law that has not been, but should be, settled by this Court.

The practice of veterinary medicine is a regulated activity in the State of Arkansas; the Arkansas Veterinary Medical Examining Board (hereafter "the Board") is the regulatory agency to which the Arkansas legislature has delegated, in large part, the authority to regulate the practice of veterinary medicine in Arkansas.

When the legislature delegated regulatory authority to the Board, the legislature specifically withheld from the Board the power to regulate certain classes of practitioners of veterinary medicine by exempting them from the general licensing requirements applicable to all other persons who practice veterinary medicine. The general requirement of a certificate of license from the Board is set forth in Ark. Code Ann. §17-99-307(a), and the various classes of persons exempt from Board licensure are set forth in Ark. Code Ann. §17-99-307(b).

The specific exemption to which the Petitioner was entitled is set forth in Ark. Code Ann. §17-99-307(b)(8). The Petitioner is a veterinarian who is a

graduate of a foreign college of veterinary medicine and who, at all times relevant to her claim, was in the process of obtaining an Educational Commission for Foreign Veterinary Graduates certificate and was performing duties or actions under the direction and supervision of a licensed veterinarian. The Petitioner claims a protected property interest in the permission to engage in the regulated activity she received from the State of Arkansas by virtue of the statutory exemption from Board licensure, and that the existence of her protected property interest entitled her to notice of any contemplated action against her interest as well as an opportunity to be heard prior to any action being taken.

The Defendants are all officials of the Arkansas Veterinary Medical Examining Board. The Petitioner asserted an action against them pursuant to 42 U.S.C. § 1983 for deprivation of her protected property interest without due process of law, alleging that during meetings of the Board on three separate occasions, the Defendants determined that the Petitioner was practicing veterinary medicine without a license and took action against her without giving her notice of the contemplated action or affording her an opportunity to be heard.

The District Court granted summary judgment in favor of the Defendants. The United States Court of Appeals for the Eighth Circuit entered its

Judgment affirming the decision of the District Court, holding that the exemption which the Petitioner claimed did not represent a protected property interest and that the Defendants were entitled to immunity. It is from the Judgment of the Court of Appeals that this Petition arises.

REASONS FOR GRANTING THE WRIT

I. IMPORTANT QUESTION WHICH SHOULD BE SETTLED.

All of the several states, including those in the Eighth Circuit, regulate various businesses, professions and occupations within their borders. All persons who intend to engage in state-regulated occupations generally must first obtain a certificate of license or registration from the particular state agency which regulates that occupation. Engaging in the regulated conduct without a license renders the conduct illegal.

In the state of Arkansas, 62 different professions, businesses and occupations are regulated by the state. See, Ark. Code Ann. §17-10-101 through §17-106-111. The general rule of law is that it is unlawful for a person to engage in state-regulated conduct unless that person has first obtained a certificate of license or registration from the state. In many occupations, such as the one at issue in this

case, engaging in the regulated conduct without a license rises to the level of a criminal offense.

There are numerous exceptions to the requirement of a certificate of license. In Arkansas alone, state law creates exemptions from the requirement of a certificate of license for 44 of the 62 regulated occupations, including the one at issue in this case: Contractors, A.C.A. §17-25-102, A.C.A. §17-25-513; Counsellors, A.C.A. §17-27-103; Alcoholism and Drug Abuse Counsellors, A.C.A. §17-27-403; Electricians, A.C.A. §17-28-304, 309, 310 (mentioned but not defined); Embalmers and Funeral Directors, A.C.A. §17-29-311(b); Engineers, A.C.A. §17-30-105; Foresters, A.C.A. §17-31-301; Geologists, A.C.A. §17-32-302; Heating, Ventilation, Air Conditioning, and Refrigeration Workers, A.C.A. §17-33-106; Interior Designers, A.C.A. §17-35-104, A.C.A. §17-35-604; Landscape Architects, A.C.A. §17-36-309; Pest Control Services, A.C.A. §17-37-202, A.C.A. §17-37-203; Plumbers, A.C.A. §17-38-302; Personal Investigators and Private Security Agencies, A.C.A. §17-40-103; Real Estate Brokers and Salespersons, A.C.A. §17-42-104; Soil Classifiers, A.C.A. §17-47-103; Transient Merchants, A.C.A. §17-49-104; Water Well Constructors, A.C.A. §17-50-108; Home Inspectors, A.C.A. §17-52-204; Health Educators, A.C.A. §17-53-106; Chiropractors, A.C.A. §17-81-302; Dentists, Dental Hygienists, and Dental

Assistants, A.C.A. §17-82-302; Dieticians, A.C.A. §17-83-104; Hearing Instrument Dispensers, A.C.A. §17-84-102; Lay Midwives, A.C.A. §17-85-105; Massage Therapists, A.C.A. §17-86-301(b); Nurses, A.C.A. §17-87-102(4)(c), A.C.A. §17-87-103; Occupational Therapists, A.C.A. §17-88-103; Ophthalmic Dispensers, A.C.A. §17-89-103; Optometrists, A.C.A. §17-90-101(d), A.C.A. §17-90-102; Pharmacists and Pharmacies, A.C.A. §17-92-102; Physical Therapists, A.C.A. §17-93-301; Physicians and Surgeons, A.C.A. §17-95-203; Podiatric Medicine, A.C.A. §17-96-102; Psychologists and Psychological Examiners, A.C.A. §17-97-103 A.C.A. §17-97-104; Disease Intervention Specialists, A.C.A. §17-98-104; Respiratory Care Practitioners, A.C.A. §17-99-301(b); Speech Language Pathologists and Audiologists, A.C.A. §17-100-104; Veterinarians and Animal Technicians, A.C.A. §17-101-307(b); Acupuncturists, A.C.A. §17-102-210A.C.A. §17-102-211; Social Workers, A.C.A. §17-103-104; Perfusionists, A.C.A. §17-104-313; Physician Assistants, A.C.A. §17-105-106; Persons Using Radioactive Materials, A.C.A. §17-106-111.

Although the Eighth Circuit Court of Appeals has articulated a two-part test to be used in determining whether a protected property interest exists, Craft v. Wipf, 836 F.2d 412, 417 (8th Cir. 1987), and Jennings v. Lombardi, 70 F.3d 994 (8th

Cir. 1995), it did not apply the test to the exemption which the Petitioner claims. Instead of using its stated test and determining (1) it contains particularized substantive stand-ards or criteria that guide the decisionmakers, and (2) it uses mandatory language requiring the decisionmakers to act in a certain way, thus limiting the official's discretion , the Court of Appeals held that,

> . . .the statute's exemption did not create a protectable property interest, because it did not entitle Dr. Dunham to do anything; she was merely exempted from a licensing requirement. The statute did not change Dr. Dunham's legal status in any way: If the licensing requirement had not been enacted, she would have been entitled to practice veterinary medicine without a license, which is precisely the right that she is presently claiming. Her exemption from the licensing requirement therefore created no constitutionally protected property interest.

It is the absence of binding precedent for the determination of protected property interests which allowed the Court of Appeals to decide this issue in such an inconsistent manner.

While it is settled law that the courts must look to state law in order to determine the existence of a protected property interest, the Court has not established a uniform test for the courts to apply to state law when making such determinations. Likewise, the Court has never addressed the specific issue of whether a state law which grants an exemption from the requirement of a certificate of license from a state regulatory agency, otherwise mandatory for all persons who engage in the regulated activity, creates a protected property interest in that exemption.

In view of the large number of activities now regulated by agencies and boards of the several states and the corresponding large number of exemptions created by state law from the requirement of an agency certificate of license, a significant number of persons will be affected by the decision in this case. The question of whether a protected property interest is created by a state law which grants an exemption from the otherwise mandatory requirement of an agency certificate of license is therefore an important question which should be settled by the Court.

II. ABSOLUTE IMMUNITY.

Because the Court of Appeals found that even if the Petitioner did have a protected property interest in the exemption, her claim still would have failed

because the Defendants were entitled to absolute immunity, the Petitioner addresses that issue, as well. The Petitioner acknowledges the caveat in Supreme Court Rule 10 that a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule, but urges the Court that because the issue is so narrow, and the law so clear, the Petitioner's case represents the rare exception to that general rule.

The Court of Appeals held that the defendants are entitled to absolute immunity, stating, "To the extent that the Board weighed evidence, made factual determinations, determined sanctions, and issued written decisions, we conclude that these duties are functionally comparable to the duties performed by courts." (Opinion, p. 5, Par. 2; App. 22)

The Petitioner does not challenge or disagree with the Court of Appeals' findings concerning the Defendant Board members' statutory duties.[1] (Opinion, p. 6, Par. 1; App. 23) There is no question that the Board members had statutory

---

[1]Defendant Glover is not a Board member. The statutory powers attributable to Board members and noted by the Court do not apply to her, and Ark. Code Ann. §§17-99-101, et seq., confer no judicial or prosecutorial powers upon her position.

authority to act judicially or to perform prosecutorial functions in certain situations. The narrow question of what the Defendants were doing at the particular times they acted is a separate matter entirely, and is the issue with which the Petitioner takes exception.

It does not follow that just because the Defendant Board members had statutory authority and could have lawfully acted judicially or prosecutorily, they therefore were performing judicial or prosecutorial functions at a given time. Whether a government official is entitled to absolute or qualified immunity depends upon the official's function **in a particular context or proceeding**. Forrester v. White, 484 U.S. 219, 225, 98 L.Ed.2d 555, 108 S.Ct. 538 (1988). (Emphasis supplied.)

The facts in the record consist of the affidavits submitted by the parties (App. 26 - 120), the Defendants' Statement of Uncontested Material Facts (App. 122), and the Petitioner's Statement of Contested Material Facts (App. 129). All of the affidavits the Defendants submitted to the District Court are essentially identical, save the Affidavit of Defendant Glover.

While it is conceded that the Defendant Board members were initially performing functions comparable to a judge's on the third occasion when they heard a complaint concerning the Petitioner's

father, they then ceased acting judicially when they stepped out of the role of the decision maker and entered into an agreement with the Petitioner's father. (Par. 11 of Defendants' Statement of Uncontested Material Facts; App. 124) A judge's function is not to enter into agreements with parties, but rather to decide controversies before the tribunal.

None of the affidavits presented a single fact concerning what the Defendants were doing or the function any of the Defendants was performing on two of the three occasions they acted. Not one of the affidavits presented a single fact showing that the Defendants were acting on a complaint properly before the Board or that they were otherwise engaging in a function that was either judicial or prosecutorial on the two occasions when the Board issued its "cease and desist" letters.

In order to hold that the function the Defendants were performing was judicial in nature, the Court of Appeals had to assume facts not in the record. It is not the responsibility of the courts to assume facts or supply proof not in evidence. Robinson v. Freeze, 15 F.3d 107 (8th Cir. 1994); Buckley v. Fitzsimmons, 113 S.Ct. 2606 (1993); Kohl v. Casson, 5 F.3d 1141 (8th Cir. 1993).

To compound the error, the Court of Appeals erroneously placed the burden of proof on this issue

on the Petitioner, holding that she produced no evidence showing that the Defendants acted in non-judicial or non-prosecutorial capacities, or that they acted in "complete absence of all jurisdiction." (App. 23)

It is not the Petitioner's responsibility to prove that the Defendants were not acting in a quasi-judicial capacity; it is the Defendants' burden to prove that they were acting judicially or prosecutorily at the times in question. An official seeking the protection of absolute immunity bears the burden of establishing it for the particular function. Robinson v. Freeze, supra; Buckley v. Fitzsimmons, supra. Kohl v. Casson, supra.

Even if the Defendants had presented facts showing that they were performing judicial or prosecutorial functions at the times in question, they still would not be entitled to a claim of absolute immunity. A well recognized exception to a claim of absolute immunity is when the official acts in the absence of jurisdiction. Mireles v. Waco, 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991).

The Petitioner presented facts to show that each of the Board's several actions concerning the Petitioner was based upon the Board's accusation that she was practicing without a license, an offense over which the Board had no jurisdiction. (Affidavit of

Sandra K. Reynolds, Exhibits G, H and I, App. 55 - 58) The Defendants presented no facts on this issue.

In Ark. Code Ann. §17-99-305(a)(1) - (21), the Arkansas legislature gave the Defendants statutory authority to act judicially concerning certain specific violations of the Arkansas Veterinary Medical Practice Act; practicing without a license was not a violation which the Board had jurisdiction to adjudicate.

Not only did the Defendants lack specific statutory authority to act judicially concerning an accusation that a person was practicing without a license, but such violations are crimes, over which only the Arkansas courts have jurisdiction. Ark. Code Ann. §17-99-312 makes practicing veterinary medicine without a license a criminal offense. Jurisdiction to hear and decide criminal cases is conferred exclusively upon the Arkansas Police, Municipal and Circuit Courts. Ark. Const., Art. 7, §11, §40, Ark. Code Ann. §16-88-101(A)(3)(b) (1987 Supp.).

The Petitioner also demonstrated that the Defendants otherwise acted in the complete absence of their jurisdiction. The Board took direct injunctive action by issuing its "cease and desist" letters in the complete absence of jurisdiction. If the Board deemed that it was necessary to enjoin a violation of

the provisions of the Veterinary Medical Practice Act, the Board did not have statutory authority to do so itself, but was required to institute legal proceedings in a court of competent jurisdiction. Ark. Code Ann. §17-99-312 (e).

The Board nevertheless ordered the Petitioner to cease and desist the practice of veterinary medicine and ordered her employers to cease and desist from employing her, upon pain of official action if they did not do so.

CONCLUSION

The question of whether a protected property interest is created by a state law which grants an exemption from the otherwise mandatory requirement of an agency certificate of license is an important question which affects a significant number of persons and has not been, and should be, settled by the Court. When addressing this question, the Court should set out a uniform test for the courts to apply to state law when making the determination of whether a state law creates a protected property interest.

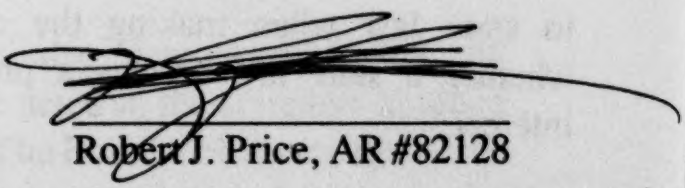
The Court should reaffirm its prior holdings to the effect that in order to maintain a claim of absolute judicial immunity, the party asserting that affirmative defense has the burden of proving that the function he

or she was performing at the time he or she acted was functionally comparable to that of a judge or prosecutor. The Defendants in this case did not do so, presenting no facts whatsoever to show the nature of the function they were performing, and the Court should hold that they are not entitled to absolute immunity.

Even if the Defendants in this case had presented such facts, they still are unable to claim absolute immunity because they acted in the complete absence of jurisdiction. The Board had no jurisdiction to hear the type of violation of which the Petitioner stood accused, nor did it have the authority to take injunctive action against the Petitioner or her employers, and the Court should so hold.

Respectfully submitted,

PRICE LAW FIRM
5115 Cantrell Road
Little Rock, AR 72207
(501) 664-0878



Robert J. Price, AR #82128